

No. 10-17-00029-CV

IN THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS	FILED IN 10th COURT OF APPEALS WACO, TEXAS 6/15/2017 5:14:47 PM SHARRI ROESSLER Clerk
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SANDRA K. BULLARD

Appellant

V.

REBECCA ANN STIFFLEMIRE AND LARRY STIFFLEMIRE

Appellees

On appeal from the 21st District Court
of Burleson County, Texas
Cause No. 28-310

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal of a verdict rendered after a bench trial concerning the enforceability of a Contract for Deed.

TRIAL COURT

27th Judicial District of Burleson, County, Texas, Hon. Carson Campbell.

COURSE OF PROCEEDINGS & DISPOSITION

Sandra Bullard filed suit against Rebecca and Larry Stifflemire for breach of contract for deed, seeking enforcement of the Agreement, actual, and liquidated damages. (CR 293-308). At trial, Defendant-Appellees conceded that the Contract for Deed was enforceable and that they failed to comply with the Texas Property Code. (1 RR 10). Following a brief bench trial, the trial court concluded that the contract for deed “lapsed” as a result of Bullard’s failure to make a payment in 1995, and was therefore unenforceable. (CR 310-311). Accordingly, the trial court entered a take-nothing judgment in favor of the Defendants. (*Id.*).

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39.1 and the Local Rules, Sandra Bullard requests oral argument and submits that it would materially aid the decisional process in this case.

ISSUES PRESENTED

1. Did the trial court err in concluding that the Contract for Deed “lapsed” and was therefore unenforceable?
2. Was the trial court’s conclusion that the Contract for Deed lapsed contrary to the facts conclusively established as a matter of law?
3. Did the trial court err in failing to find that the Defendants violated § 5.077 of the Texas Property Code?

FACTUAL BACKGROUND

A. The Parties Enter the Contract for Deed

On May 1, 1994, Sandra Bullard entered into a Contract for Deed with Rebecca Ann Stifflemire and her husband, Larry Stifflemire, for the purchase of real property to be used as a residence. (1 RR 10, 16-18; 2 RR 4-12). Under the Contract for Deed, Bullard agreed to buy and the Stifflemires agreed to sell real property located in Burleson County (“the Property”). (2 RR 4-12). Both parties agreed to be bound by this Contract. (*Id.*).

B. The Contract’s Terms

The purchase price of the property was \$100,000. (*Id.*). The terms provided that Bullard would make monthly payments of \$643.72 for the first year. (*Id.*). Then, \$20,000 would be due on May 1, 1995. (*Id.*). Bullard would then continue making the monthly payments of \$643.72 for a period of five years, at which point, in 2000, the entire amount would be due. (*Id.*). Additionally, Bullard deposited the sum of \$2,500 with a title company which would be applied against the purchase price upon delivery of the deed. (*Id.*).

In the event of default, the Contract for Deed stated:

If Buyer [Bullard] defaults in prompt payment of the monthly payments or violates any of Buyer's obligations, Seller [Stifflemires] may invoke the following remedies, **subject only to the provisions of the Texas Property Code**:

- a. Declare the entire unpaid deferred principal amount and earned interest immediately due and enforce their collection; or
- b. Cancel this contract, declare all of Buyer's interest under this contract forfeited, and retain as liquidated damages all money paid by Buyer to Seller under this contract . . .
- c. Collect rents if the property is rented or rent it and collect rents if it is vacant and apply the proceeds less reasonable expenses to payment of the deferred principal amount.

(*Id.*, *emph. added*).

Consistent with the Texas Property Code, the Agreement stated that the seller's ability to exercise its default remedies was subject to complying with the statutory notice requirements. (*Id.*). The Contract read:

Section 5.061 [Texas Property Code] **requires a notice of Seller's intent to forfeit and accelerate, which must be given as specified in Section 5.062 of the Code.**

. . .

If the property is used or to be used as Buyer's residence, **all notices from Seller to Buyer must be written**, must be conspicuous, must be printed in ten-point boldfaced type or upper-case typewritten letters, **and must include the**

statement required by Section 5.062 of the Texas Property Code.

(*Id.*, emph. added).

C. The \$20,000 Payment

It is undisputed that Bullard did not make the \$20,000 payment in 1995. (1 RR 20; 1 RR 68). Bullard testified that Larry Stifflemire waived the requirement. (1 RR 20-21). During the first year of ownership, Bullard incurred several expenses in repairing the property, including the air-conditioning, the septic system, cooling, and heating. (1 RR 19). She also filed an insurance claim on the property as a result of damages sustained in a storm. (1 RR 20-21, 24). Because she had incurred so much loss on the front end, Bullard testified, Larry Stifflemire told her not to worry about the \$20,000 payment. (1 RR 21).

Larry Stifflemire disagreed at trial. (1 RR 68). He testified that he never told Bullard she was not required to make the \$20,000 payment. (*Id.*). Instead, he testified that he told Plaintiff “just pay rent,” and continue making monthly payments of \$643.72. (*Id.*).

It was undisputed that the Stifflemires never sent any notices, required by both the Texas Property Code and the Contract for Deed, in order to enforce their remedies as a result of Bullard’s default. (1 RR 24,

78). Larry Stifflemire testified that he never sent Bullard any notice of cancellation, notice of default, or opportunity to cure the default. (1 RR 78). And, Bullard testified that she never received any notices. (1 RR 24).

D. Bullard Pays for More than Twenty Years

Since May 1, 1995, Bullard has continued to make monthly payments towards the purchase of the Property, pursuant to the Contract for Deed. (1 RR 15, 21). For more than twenty-two years, Bullard has used the property as her residence. (1 RR 19, 75). During this time, Bullard has made substantial improvements (1 RR 19, 23), raised livestock (1 RR 27, 30), paid insurance (1 RR 20), and resided with the belief and intent that she would eventually own the property (1 RR 39).

E. The Stifflemires Enter Oil and Gas Leases

In or around 2014, work crews and surveyors began entering onto the Property. (1 RR 27). Unbeknownst to Bullard, the Stifflemires had entered into oil, gas, and mineral leases on the Property. (1 RR 34-35, 79; 2 RR 21-38). The Stifflemires entered into these leases without the knowledge or consent of Bullard. (1 RR 34-35, 79).

On April 2, 2015, Bullard discovered that one of the work crews forced entry into the property, cutting a locked chain. (1 RR 28). The work crews cut down fencing and trees, removed a gate, and caused substantial damage to the property. (*Id.*; 2 RR 13-20). Even more distressing, though, Bullard found several dead livestock as a result of the crew's entry onto the property. (1 RR 30-32).

F. Bullard Files Suit

Bullard filed suit against the Stifflemires alleging breach of the Contract for Deed. (CR 6-19). She alleged that executing the oil lease and allowing third-parties onto the property caused substantial damage to Bullard, and constituted a violation of the Contract. (*Id.*).

The Defendants' Answer asserted that Plaintiff's breach of contract claim was dead-on-arrival because the Contract for Deed was unenforceable. (CR 23-27). Defendants' Answer (and summary judgment motion) asserted that the Contract for Deed was unenforceable under theories of failure of consideration, estoppel, laches, or waiver because of Bullard's failure to make the \$20,000 payment in 1995. (*Id.*; CR 45-128).

Plaintiff amended her pleadings to include a request for Declaratory Judgment that the Contract for Deed is enforceable; she also

sought a determination of the outstanding amount she owed under the Contract for Deed, if any. (CR 293-308). Additionally, Bullard sought statutory damages under the Texas Property Code for the Defendants' failure to provide required notices and statements under the Contract for Deed. (*Id.*). She also asserted a cause of action for fraud. (*Id.*).

G. The Stifflemires' Theory Changes the Day of Trial

The day of trial, the Stifflemires theory of the case changed completely; the Contract for Deed, now, was still enforceable counsel submitted. (1 RR 10). Counsel for Defendants stated:

Judge, I'll make this a little bit easier for you today by saying that the Stifflemires will stipulate that the contract for deed is still enforceable. Rather than having to make a finding as to the enforceability of it, we'll say it is fully enforceable, including all of its terms and conditions. (*Id.*).

Under the Contract for Deed, Defendants now argued Bullard owed the Stifflemires because amounts owed the Agreement had been generating interest since 1995, at a rate as high as eighteen percent for outstanding, unpaid amounts. (1 RR 11 –12). Despite having never disclosed this theory or any damages calculation in discovery or prior to trial, the Stifflemires submitted that they were now owed than 1.2

million dollars in principal and interest under the Contract for Deed. (1 RR 12; 2 RR 91-99).

H. Trial

On December 16, 2016, the parties conducted a bench trial. (1 RR 1). The trial was brief, with just two witnesses, Plaintiff, Bullard, and one of the Defendants, Larry Stifflemire. (1 RR 15, 67).

At the trial, the majority of the material facts were undisputed. The parties entered into the Contract for Deed. (1 RR 10, 16-18; 2 RR 4-12). Bullard did not make the \$20,000 payment in 1995. (1 RR 20, 68). The Stifflemires never sent any written notice to Bullard notifying her that they were exercising any of their default remedies under the Contract for Deed. (1 RR 24, 78). Bullard has continued, to make the \$643.72 monthly payments for more than 22 years. (1 RR 15, 21).

Further, the evidence showed that in 1997 the Stifflemires received the money that was held by the title company that was to be released to them upon delivery of the deed, despite never delivering the deed to Bullard. (1 RR 23-24, 2 RR 39). And, the Stifflemires never sent any of the required, written annual accounting notices required by the Texas Property Code. (1 RR 10, 57-58, 78).

Instead, the brunt of the dispute concerned who owed what under the Contract for Deed. Bullard submitted, and presented evidence that she was entitled to, damages for breach of contract, fraud, and statutory damages under the Texas Property Code. (1 RR 30-33, 62-65; 2 RR 13-20, 79-89). Bullard testified that the outstanding amount owed under the Contract was \$41,669, less offsets to which she was entitled. (1 RR 38-39).

The Stifflemires argued that they were entitled to the outstanding principal and interest under the Contract for Deed, more than 1.2 million dollars, though noting the need reduce that amount due to concerns of usury. (1 RR 12 ; 2 RR 91-99).

I. Judgment and Appeal

The trial court entered final judgment on January 17, 2017, rendering a take-nothing judgment in favor of the Stifflemires. The Final Judgment stated that the “the contract for deed that is the basis of this suit lapsed on May 1, 1995, and that as of May 1, 1995, the parties were subject to a month-to-month lease.” (CR 310-311).

In its Findings of Fact and Conclusions of Law, requested by Bullard, the trial court made factual findings that Bullard failed to make

the \$20,000 payment on May 1, 1995. (CR 368-370). The trial court found that the Stifflemires never sent any notice of cancellation, acceleration, modification, or forfeiture of the Contract for Deed to Bullard. (*Id.*).

On the basis of these factual findings, the trial court rendered legal conclusions that “[t]he Contract for Deed lapsed on May 1, 1995, because Bullard failed to make the \$20,000 payment . . . and that as of May 1, 1995, Bullard’s possession of the Property was subject to a month-to-month lease.” (*Id.*).

Immediately thereafter, the Stifflemires attempted to use the trial court’s judgment to evict Bullard from the Property. (*See, e.g.* CR 321-332). After staying the eviction proceedings, and suspending enforcement of the judgment, Bullard filed this appeal. (CR 368-370, 319-320).

SUMMARY OF THE ARGUMENT

Contracts for deed allow unscrupulous sellers to take extreme advantage of others. It is for this reason that the Texas Legislature has enacted stringent safeguards to protect buyers of property under these agreements. Accordingly, a seller who wishes to exercise its remedies under a contract for deed must first comply with the statutory

requirements, which include written notice of default and an opportunity to cure the default.

In this case, it is undisputed that the parties entered into a Contract for Deed. It is also undisputed that the sellers never made any attempt to, or actually did, comply with the conditions of the Texas Property Code, which would allow them to exercise their remedies. Nonetheless, the trial court concluded that in 1995 the sellers were able to cancel the Contract, and retain the amounts already paid, on the basis that the Agreement had “lapsed.”

It is from this errant legal conclusion that the entirety of the trial court’s judgment flowed. The trial court rendered judgment against Bullard’s claims for breach of contract, fraud, and statutory damages, all on the basis that the Contract for Deed “lapsed” and was therefore unenforceable. This conclusion is unsupported both in law and fact.

The trial court misapplied the Texas Property Code in rendering judgment. The undisputed facts evinced that the parties entered into a Contract for Deed, and the sellers never complied with the pre-requisite statutory requirements, in order to enforce her remedies upon the buyer’s default. Accordingly, the trial court’s holding is contrary to the express

language of the statute and defeats the very purpose of the statutory protections. The trial court's decision is entitled to no deference and must be reversed.

Alternatively—and preempting any argument that the judgment may stand on deference to the trial court's factual conclusions—the trial court's judgment was contrary to the facts conclusively established as a matter of law. The facts in the record conclusively established non-compliance with the Texas Property Code, a legal pre-requisite to any modification or cancellation of the Contract for Deed. The facts conclusively established that the Contract for Deed was still enforceable. The only explanation for the trial court's error was a misapplication of law to facts.

Finally, because Bullard conclusively established statutory violations, she is entitled to a reversal of the trial court's judgment as to statutory damages, and requests this Court render judgment as to liability in Appellant's favor, and remand solely on the issue of the amount of unliquidated damages, which include the amount of reasonable attorneys' fees owed to Bullard, through trial, appeal, and remanded proceedings.

ARGUMENT AND AUTHORITIES

I. The Trial Court Erred, as a Matter of Law, in Concluding that the Contract for Deed Lapsed and was Therefore Unenforceable.

The Contract for Deed between the parties is subject to the protections of the Texas Property Code. In order to cancel, amend, or modify the Contract for Deed, the sellers had to comply with the statutory requirements. It is undisputed that Stifflemires failed to comply with the statutory requirements. The trial court's legal conclusion that the buyer's "default" simply resulted in a lapse of the Agreement, is wrong as a matter of law. The judgment is contrary to the express language of the statute, and defeats the very purpose of the statutory protections.

A. The standard of review is *de novo*.

Conclusions of law are reviewed *de novo*, without deference to the lower court's conclusions. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *see also Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.—Houston [14th Dist.] 2000, no pet.). When performing a *de novo* review, the appellate court exercises its own judgment and re-determines each legal issue. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

The trial court's application of the Texas Property Code is a question of statutory construction, a legal question reviewed *de novo*.

City of Rockwall v. Hughes, 246 S.W.3d 621, 625 (Tex. 2008). Where the statutory text is unambiguous, the court must adopt the interpretation supported by the statute’s plain language. *Id.*, citing, *Tex. Dep’t of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

Further, and to the extent the court’s analysis turns on construction of the Contract for Deed (which both incorporated and was subject to the Texas Property Code), the court’s construction of the unambiguous terms is a question of law for the court, reviewed *de novo*. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011); *Gonyea v. Kerby*, No. 10-12-00182-CV, 2013 Tex. App. LEXIS 9920, at *10 (App.—Waco Aug. 8, 2013, pet. denied); *see also Red Ball Oxygen Co. v. Sw. R.R. Car Parts Co.*, No. 12-16-00049-CV, 2017 Tex. App. LEXIS 4955, at *6 (App.—Tyler May 31, 2017, no pet h.).

B. The Texas Property Code’s protections apply to the Contract for Deed.

A contract for deed is a type of executory contract in the nature of a financing device. *Ward v. Malone*, No. 13-06-108-CV, 2007 Tex. App. LEXIS 9494, at *6 (App.—Corpus Christi Dec. 6, 2007, pet. denied). A contract for deed, unlike a mortgage, allows the seller to retain title to the property until the purchaser has paid for the property in full.” *Flores*

v. Millennium Interests, Ltd., 185 S.W.3d 427, 429 (Tex. 2005); *see also Tran v. Luu*, No. 10-13-00308-CV, 2014 Tex. App. LEXIS 3956, at *1 (App.—Waco Apr. 10, 2014, no pet. h.).

Contracts for deed are subject to the protections in the Texas Property Code. TEX. PROP. CODE § 5.062. The protections apply to contracts for deed “for conveyance of real property used or to be used as the purchaser’s residence . . .” *Id.*; *see also Nguyen v. Yovan*, 317 S.W.3d 261, 270–271 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (holding that when it was undisputed that property was used as residence, trial court erred in holding statute inapplicable).

The Agreement, presently, was a contract for deed for conveyance of real property to be used as the purchaser’s residence, and was therefore subject to the protections of the Texas Property Code. The Agreement, which the parties titled “Contract for Deed,” involved a transaction for real property to be concluded in the future. (2 RR 4-12). The undisputed evidence showed that Bullard used the Property as her residence. (1 RR 15, 19, 75). Accordingly, the Texas Property Code’s protections govern the parties relationship and this Agreement.

C. In order to cancel, amend, or modify a Contract for Deed, the seller must comply with the Texas Property Code.

1. The Texas Legislature enacted Contract for Deed protections to prevent abuses by sellers.

As the Texas Legislature has long recognized, contracts for deed are subject to abuses by unscrupulous sellers and present serious consumer protection issues. *See, generally Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 434 (Wainwright, concurring) (Tex. 2005). The purpose of the protections are clear, to prevent fraudulent and abusive conduct by sellers. *Id.*

Because of the onerous consequences and subject for abuse, the Texas Legislature provided a clear roadmap which sellers must navigate if they wish to exercise remedies for a buyer's default under a contract for deed. The seller must give written notice of the default and provide the buyer with the necessary information and time to cure the default. TEX. PROP. CODE §§ 5.064-5.065.

2. The Property Code provides conditions which a seller must comply with in order to exercise its remedies.

Current Texas Property Code § 5.064, "Seller's Remedies on Default," provides that a seller may enforce its remedies against a buyer "only if" certain conditions are first met. The Code version in effect from

May 1994–May 1995 (date of execution and missed payment, respectively) retains this same, relevant language, requiring the seller to comply with certain conditions before it may exercise any remedies.

Section 5.061 (1993) “Avoidance of Forfeiture and Acceleration” provides:

A seller may enforce a forfeiture of interest and the acceleration of the indebtedness of a purchaser in default under an executory contract for conveyance of real property used or to be used as the purchaser's residence **only after notifying the purchaser of the seller's intent to enforce the forfeiture and acceleration** and the expiration of the following periods:

(1) if the purchaser has paid less than 10 percent of the purchase price, 15 days after the date notice is given

1993 Tex. Prop. Code § 5.061 (emph. added)

Section 5.062 (1993) further provides:

Notice under Section 5.061 of this code **must be in writing**. If the notice is mailed, it must be by registered or certified mail. The notice must be conspicuous and printed in 10-point boldfaced type or uppercase typewritten letters, and must include the statement:

NOTICE

YOU ARE LATE IN MAKING YOUR PAYMENT
UNDER THE CONTRACT TO BUY YOUR
HOME. UNLESS YOU MAKE THE PAYMENT

BY (date) THE SELLER HAS THE RIGHT TO TAKE POSSESSION OF YOUR HOME AND TO KEEP ALL PAYMENTS YOU HAVE MADE TO DATE.

(b) The notice must also specify:

(1) the delinquent amount, itemized into principal and interest;

(2) any additional charges claimed, such as late charges or attorney's fees; and

(3) the period to which the delinquency and additional charges relate.

1993 TEX. PROP. CODE § 5.062 (emph. added).

After the seller provides the statutorily required notice, the seller must then allow a period for the buyer to cure the default. 1993 TEX. PROP. CODE §§ 5.061, 5.063. Further, these statutory requirements were recited in the Contract for Deed, which provided that the seller could invoke its remedies “subject only to the provisions of the Texas Property Code.” (2 RR 7).

As evidenced by the statute’s plain language and the legislative history, these procedural safeguards are in place to prevent consumer abuse. The protections ensure that prior to any adverse action under the

agreement, the buyer is afforded with notice of the default, information about the available remedies, and an opportunity to cure the default.¹

3. A seller may enforce its remedies only after complying with the statutory requirements.

A seller under a contract for deed may enforce its remedies upon the buyer's default, *only after* complying with the statutory requirements. *See, e.g., Ward v. Malone*, No. 13-06-108-CV, 2007 Tex. App. LEXIS 9494, at *6 (App.—Corpus Christi Dec. 6, 2007) (pet. denied).

Thus, for example, in *Ward v. Malone*, the court held that a seller who failed to comply with the statutory requirements of the Texas Property Code was barred from exercising his remedies. *Id.* In *Ward*, the seller under a contract for deed sent a notice of default but failed to provide the necessary period to cure the default. *Id.* at *3. On appeal, the central issue was whether the seller was entitled to exercise his remedies under the agreement in the absence of compliance with the statutory requirements. *Id.* at *3-4 .

The “threshold issue,” the court noted, was “whether notice was given.” *Id.* at *10. The court found that the seller failed to comply with

¹ *See also* TEX. PROP. CODE § 5.072, providing further protection to sellers by prohibiting oral agreements concerning a contract for deed.

the Property Code. *Id.* The court then noted that the seller could exercise its remedies (acceleration) only if it first complied with the statutory requirements.

The court then held “the applicable sections of the Texas Property Code clearly provide that the maturity of payments due under a contract for deed cannot be accelerated unless there has first been an act of default under the contract for deed **and the person obligated to make the payments has been given notice and an opportunity to cure the default.**” *Id.* (emph. added). Because the seller failed to comply, the seller was unable to exercise its remedies, even in light of buyer’s default. *Id.*

As the plain language of the statute makes clear, and the case law bears out, a seller’s ability to exercise its remedies is subject to the protections and procedures established by the Texas Property Code. There are no ‘extra-statutory’ remedies that a seller under a contract for deed may exercise, without complying with the Property Code.

D. The Stifflemires failed to comply with the Texas Property Code.

It is undisputed that the Stifflemires failed to comply with the statutory requirement to send notice of default in order to cancel, modify,

or accelerate the Contract for Deed. Bullard testified that she never received any notice of cancellation of the Contract for Deed. (RR 24). The Defendant, Larry Stifflemire, testified the same, he never sent Bullard any notice of cancellation, notice of default, or opportunity to cure the default. (1 RR 78).

On the basis of this undisputed evidence, the trial court, concluded that “Stifflemires never provided any notice of cancellation, acceleration, modification, or forfeiture of the Contract for Deed to Bullard.” (CR 372) However, from this proper factual predicate the trial court’s legal analysis went awry.

E. The trial court’s conclusion that the Contract for Deed lapsed is wrong as a matter of law.

There is no legal support for the contention that a contract for deed may simply “lapse.”² Rather, the parties’ rights and remedies under the Agreement are those provided for in the Property Code. TEX. PROP. CODE § 5.062. The trial court’s legal conclusion that the buyer’s “default”

² Further, the remedy of forfeiture of the buyer’s payments and interest under the contract, is a harsh remedy, not favored by the courts. *See, e.g., T-Anchor Corp. v. Travarillo Assocs.*, 529 S.W.2d 622, 627 (Tex. Civ. App.-Amarillo 1975, no writ); *Tom v. Wollhoefer*, 61 Tex. 277 (1884).

results in a lapse of the Agreement, is in violation of the express language of statute and defeats the very purpose of statutory protections.

1. The trial court's judgment is contrary to the express language of the statute.

When construing a statute, a court begins with its language. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *see also Morton v. Nguyen*, 369 S.W.3d 659, 670 (Tex. App.—Houston [14th Dist.] 2012). The court's primary objective is to determine the Legislature's intent which, when possible, it discerns from the plain meaning of the words chosen. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). If the statute is clear and unambiguous, the court must apply its words according to their common meaning. *Id.*, citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999).

Here, the statute provides that “a seller may enforce a forfeiture of interest . . . **only after notifying the purchaser of the seller's intent to enforce the forfeiture . . .**” 1993 TEX. PROP. CODE § 5.061 (emph. added). Thus, in order to exercise its contractual option to “cancel the contract, [and] declare all of Buyer’s interest under this contract forfeited, and retain[ed] as liquidated damages . . .” the Stifflemires were required to

comply with this statutory requirement. (*See* 2 RR 7, statutory protections were also incorporated into the Contract for Deed).

The trial court concluded that the Stifflemires did not comply with these statutory requirements. (CR 372 “Stifflemires never provided any notice of cancellation, acceleration, modification, or forfeiture of the Contract for Deed to Bullard.”). The Stifflemires failed to provide the required notice of default, inform Bullard of their intent to exercise their remedies, inform her of the potential forfeiture of her interest, or give her a period to cure the default. (*Id.*; 1 RR 24, 78).

And yet, the trial court held that the Stifflemires were allowed to obtain the same result, by simply declaring the effect of the default a “lapse” of the Agreement. Per the express terms of the statute, the Stifflemires could obtain this result “only after” complying with the notice provisions. The trial court’s decision is in contravention of the express terms of the statute, and wrong, as a matter of law.

2. The trial court’s holding defeats the very purpose of the statute.

The Texas Legislature enacted the statutory requirements, which a seller must comply with in order to exercise its remedies, to prevent

exactly the types of abuses on display in this case: collecting payments for decades, only to claim, at the last minute, that the contract is unenforceable; or, perhaps most egregiously, claiming that the buyer actually owes the sellers in excess of a million dollars, despite having never asserted, or provided notice of the alleged amount owed. *See, e.g., Flores v. Millenium Interests, Ltd.*, 185 S.W.3d at 434 (Wainwright, concurring).

Each and every one of the notices that the Stifflemires failed to provide, almost certainly would have prevented the situation that exists now. *Id.* (noting that statutory protections ensured buyers had right to “critical information” about the property). The Stifflemires cannot now benefit from their own non-compliance.

Allowing a seller under a contract for deed to achieve the result of cancellation and forfeiture by simply declaring a “lapse” would effectively allow sellers to end-run around the Property Code’s protections. It would enable the Stifflemires to cancel the Contract and consider all interest under the Contract forfeited, without requiring the sellers to comply with the applicable, statutory requirements.

It grants an automatic out for the unscrupulous seller, in contradiction of the terms and purpose of the statute. The judgment effectively allows the Stifflemires to benefit from their own deception and non-compliance with the statutory safeguards intended to protect buyers.

The trial court's decision is unfounded, against the express statutory language, in contravention of the Agreement, and in error. The trial court's erroneous application of the law, and the express terms of the contract, caused the rendition of an improper judgment, and cut short the relevant analysis in each of Plaintiff's claims. Accordingly, reversal and remand is warranted.

II. The Trial Court's Conclusion that the Contract for Deed Lapsed was Contrary to the Conclusively Established Facts.

Alternatively, if necessary, Bullard submits that the trial court's judgment was contrary to the facts conclusively established as a matter of law. There is no evidence to support the trial court's judgment that the Contract lapsed. The evidence conclusively established the contrary: the formation and existence of a Contract and the complete absence of the necessary conditions which would allow cancellation, modification, termination, or "lapse" of the Agreement.

A. Standard of review.

A legal sufficiency challenge “as a matter of law” challenges the legal sufficiency of the evidence on which the challenging party has the burden of proof. *Chang v. Linh Nguyen*, 76 S.W.3d 365, 368 n. 1 (Tex. App.—Houston [14th Dist.] 2002, no pet.). In considering a party’s matter of law challenge, a reviewing appellate court must conduct a two-prong analysis.

It must first examine the record for evidence that supports the finding and ignore all evidence to the contrary. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241-42 (Tex. 2001). If there is no evidence that supports the finding, the appellate court must then consider the entire record to determine whether the contrary proposition was established as a matter of law. *Id.* at 241. The legal sufficiency challenge will be sustained only if the contrary proposition was conclusively established by the evidence. *Id.*

In conducting review, the Court views the evidence in the light most favorable to the trial court's findings, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless

reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 810, 823 (Tex.2005).

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict; appellate court reviews the legal and factual sufficiency of the evidence used to support them just as it would review a jury's findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When challenged, a trial court's findings of fact are not conclusive if, as in the present case, there is a complete reporter's record. *In re K.R.P.*, 80 S.W.3d 669, 673 (Tex. App.—Houston [1st Dist.] 2002 pet. denied); see also *Amador v. Berrospe*, 961 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

B. The record conclusively establishes that the Contract did not lapse.

If there is no evidence supporting the finding of the trial court, and the contrary is conclusively established as a matter of law, the appellate court must sustain the legal sufficiency challenge. *Nguyen*, 317 S.W.3d 261. The *Nguyen* case provides guidance in this analysis, with an analogous set of facts.

In *Nguyen*, buyer and sellers executed a contract for deed. *Id.* at 264. After the buyer had made payments for several years, the sellers indicated that they were terminating the contract. *Id.* at 264-65. The buyer brought suit for breach of contract and statutory liquidated damages, alleging that the sellers failed to comply with the Texas Property Code's written notice requirement and failed to provide annual accounting statements. *Id.* at 265-66.

After a bench trial, the trial court rendered a take-nothing judgment in favor of the sellers. *Id.* In its legal conclusions, the trial court stated that the sellers were not required to abide by the provisions of the Texas Property Code because the contract was unenforceable due to the statute of frauds. *Id.* at 266. And, even if the parties were required to comply with the Property Code, the trial court concluded, the sellers made a good faith effort to comply. *Id.*

The buyer appealed and lodged a legal sufficiency challenge that the trial court's conclusion that no statutory violations occurred was contrary to the facts conclusively established as a matter of law. *Id.* at 270.

The court concluded that the contract for deed was enforceable, and because it was used as the buyer's residence, was subject to the protections of the Texas Property Code. *Id.* The court then turned to the trial court's conclusion that no statutory violations occurred. *Id.* at 270-71. The court of appeals noted that the sellers did not "cite to any evidence that they complied with this [5.077] statutory section in good faith." *Id.* at 271.

Rather, the evidence showed that the sellers did not give any annual accounting statements. *Id.* As a result, the contrary position—failure to comply with the Texas Property Code—was established, as a matter of law. *Id.* at 271-72. On this basis, the court concluded that buyer "has demonstrated, as a matter of law, that the [sellers] failed to comply with section 5.077." *Id.* at 272.

Similarly, the court sustained the buyer's sufficiency challenges regarding the trial court's conclusion that there was no violation of sections 5.063 (notice of default requirement) and 5.065 (period to cure requirement). There was no evidence that the sellers complied with these provisions. *Id.* at 272-273. And, as there was no evidence of compliance, the contrary was established conclusively, as a matter of law. *Id.* at 273.

Accordingly, the court sustained the buyer's sufficiency challenges, reversed and remanded to the trial court.

The facts presently warrant a similar result. The evidence conclusively establishes that the parties formed a Contract for Deed subject to the Property Code's statutory protections. (1 RR 10, 16-18; 2 RR 4-12). There was no evidence that the Stifflemires sent the statutory notices which were necessary to cancel, amend, accelerate, or modify the Contract. (1 RR 78). Plaintiff testified that she received no notices. (1 RR 24, 37-38) Defendant testified he sent no notices. (1 RR 78). There was no evidence of any notices.

Accordingly, the record conclusively establishes, as a matter of law, that there was no factual basis on which the court could conclude that the sellers complied with the statutory requirements to cancel, amend, or modify the Agreement. The trial court's conclusion then, that these facts constituted a "lapse" of the Agreement, is contrary to the evidence conclusively established as a matter of law.

C. The trial court's judgment warrants reversal.

The facts in the record conclusively establish that the Stifflemires did not succeed in, or make any attempt to, comply with the Texas

Property Code requirements, which are a pre-requisite to any modification, cancellation, or amendment to the Agreement. The facts conclusively established that the Contract for Deed was still enforceable. Accordingly, the trial court's holding to the contrary, was at odds with the facts conclusively established, as a matter of law.

The only explanation for the trial court's judgment was a misapplication of law to facts. A trial court has no discretion when determining what the law is, and may not incorrectly apply the law to the facts. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (“ . . . a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. . .”). Accordingly, both factually and legally, the trial court's judgment warrants reversal.

The appropriate remedy is remand for further proceedings. When the trial court has made findings of fact and conclusions of law relevant to an erroneous interpretation of law, but did not make findings that would control the case under a correct legal interpretation, the reviewing court reverses and remands the case for further proceedings. *Nguyen*, 317 S.W.3d at 270–271, citing TEX. R. APP. P. 43.3; *see also Jones v. Smith*, 291 S.W.3d 549 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Here, on each of Plaintiff's causes of action, the trial court's erroneous conclusions cut the relevant analysis short and caused the rendition of an improper judgment.³ Accordingly, remand for further proceedings, is necessary. The one exception, as described further below, is as to statutory damages.

III. Bullard Established, as a Matter of Law, that She was Entitled to Statutory Damages.

Because the Contract for Deed was enforceable, the parties' relationship was governed by the Agreement, and the protections afforded by the Texas Property Code. The Plaintiff asserted a claim for liquidated damages under the Texas Property Code for violations of § 5.077.

Section 5.077 provides that the seller shall provide the purchaser with an annual statement setting forth relevant information such as the amount paid under the contract, and still owing. TEX. PROP. CODE § 5.077. This statute provides yet another protection to the consumer. *See e.g., Nguyen*, 317 S.W.3d at 272 n.6 (“When a seller fails to comply with subsection 5.077(a), he is liable to the purchaser for liquidated

³ The Plaintiff presented evidence of the elements of each of these causes of action, but because of the court's errant legal interpretation, the trial court never reached ultimate conclusions on these issues.

damages.”). It seeks to prevent the very situation presently—a seller claiming, despite years of silence, that a contract has long expired, or the buyer actually owes exorbitant sums.

A seller who fails to provide these notices is liable for liquidated damages in the amount of \$100 for each annual statement the seller fails to provide and reasonable attorneys’ fees. TEX. PROP. CODE § 5.077; *see e.g. Dodson v. Perkins (In re Dodson)*, Nos. 06-11952-CAG, 07-1013, 2008 Bankr. LEXIS 4650, at *18 (U.S. Bankr. W.D. Tex. 2008, no pet. h.) (awarding buyer under contract for deed her reasonable attorneys’ fees and expenses of \$79,245.51, for violations of TEX. PROP. CODE § 5.077).

The evidence conclusively established that the Stifflemires violated § 5.077 of the Texas Property Code. Counsel for Defendants acknowledged in her opening statement “[a]nd the Stifflemires will further stipulate that they never did send notices under Section 5.077(C) of the Property Code.” One of the well-recognized ways in which the evidence in the case may become conclusive, or establish the vital facts as a matter of law, is when a party admits those facts to be true. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

Larry Stifflemire testified he did not send any notices. (1 RR 78). Sandra Bullard testified she never received any notices. (1 RR 24). The evidence conclusively establishes, and Defendants affirmatively acknowledged a violation of § 5.077.

Accordingly, Bullard requests this court to reverse the trial court's judgment finding no violation of § 5.077, render judgment as to liability for violations of § 5.077 in Appellant's favor, and remand on the issue of the amount of unliquidated damages, including reasonable attorneys' fees owed to Bullard, through trial, appeal, and remanded proceedings.

This is a proper holding where liability is uncontested. While TEX. R. APP. P. 44.1 provides that the court "may not order a separate trial solely on unliquidated damages," this rule applies only "if liability is contested." The Stifflemires conceded the validity of the Contract and acknowledged their failure to comply with § 5.077. (1 RR 10, 78). These two admissions, conceded by Defendants, give rise to liability. Accordingly, reversal and rendering judgment on liability is warranted.

PRAYER

For these reasons, Bullard prays the Court REVERSE the Judgment of the trial court, and remand the case for further proceedings;

and, specifically, REVERSE the trial court's denial of statutory damages, RENDER judgment as to liability in Appellant's favor, and remand solely on the issue of the amount of unliquidated damages, to include reasonable attorneys' fees owed to Bullard, through trial, appeal, and remanded proceedings.

Respectfully submitted,

/s/ Tyler Talbert
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above Appellees' Brief was served on counsel of record for Appellee through the Court's electronic case filing system on this 15th day of June, 2017,:

/s/ Tyler B. Talbert
Tyler B. Talbert

CERTIFICATE OF COMPLIANCE

This is to certify that the above document was created using Word 2013. The number of words (excluding the cover page, Identity of Parties and Counsel, Request for Oral Argument, Table of Contents, Table of Authorities, Signature, Certificate of Service, and Certificate of Compliance) used in the document is 6,815 as indicated by the Word program.

/s/ Tyler B. Talbert

Tyler B. Talbert

APPENDIX

1. Final Judgment
2. Findings of Fact and Conclusions of Law
3. Contract for Deed
4. 1993 TEX. PROP. CODE §5.061
5. 1993 TEX. PROP. CODE §5.062
6. 1993 TEX. PROP. CODE §5.063

Tab 1

Final Judgment

**NOTICE: THIS DOCUMENT
CONTAINS SENSITIVE DATA**

CAUSE NO. 28,310

**SANDRA K. BULLARD,
PLAINTIFF**

VS.

**REBECCA ANN STIFFLEMIRE
AND LARRY STIFFLEMIRE,
DEFENDANTS**

§
§
§
§
§
§
§

IN THE DISTRICT COURT

21ST JUDICIAL DISTRICT

BURLESON COUNTY, TEXAS

FINAL JUDGMENT

On December 16, 2016, this cause came to be heard by the Court.

Sandra K. Bullard, Plaintiff, appeared in person and by attorney of record, Michelle Lehmkuhl, and announced ready for trial.

Rebecca Ann Stifflemire and Larry Stifflemire, Defendants, appeared in person and by attorney of record, Laura Upchurch, and announced ready for trial.

No jury having been demanded, all questions of fact were submitted to the court.

The court, after hearing the evidence and arguments of counsel, is of the opinion that the contract for deed that is the basis of this suit lapsed on May 1, 1995 and that as of May 1, 1995, the parties were subject to a month-to-month lease.

With regard to the alternate claim of Plaintiff, the Court finds that Plaintiff should take nothing by this suit.

The Court further finds that the Defendant should take nothing on Defendant's claim for sanctions.

All costs of court spent or incurred in this cause are adjudged against the party incurring same.


Final Judgment
Page 1 of 2

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~~547~~

All relief requested in this case and not expressly granted is denied. This judgment finally disposes of all parties and claims and is appealable.

SIGNED on January 17th, 2017



JUDGE PRESIDING

APPROVED AS TO FORM:


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FILED 11:40 A.M.
DATE 1-18-17
Dana Fritsche
District Clerk, Burleson County
By Rennie Lewis

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Final Judgment
Page 2 of 2

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Tab 2

Findings of Fact and Conclusions of
Law

CAUSE NO. 28,310

SANDRA K. BULLARD,	§	IN THE 21 st DISTRICT COURT
	§	
V.	§	OF
	§	
REBECCA ANN STIFFLEMIRE	§	
AND LARRY STIFFLEMIRE	§	BURLESON COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on for trial before this Court without a jury on December 16, 2016. All parties and their attorneys were present. Following the presentation of evidence and arguments by all parties, the Court signed a Final Judgment on January 17, 2017. After considering the pleadings, the evidence presented at trial, and the arguments and briefs from counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about May 1, 1994, Sandra Bullard ("Bullard") and Rebecca and Larry Stifflemire (collectively "Stifflemires") entered into a Contract for Deed for the purchase by Bullard of real property owned by Rebecca Ann Stifflemire, being 30.021 acres of land, out of the J.M. Sanches League, A-55, Burleson County, Texas ("the Property").
2. The Contract for Deed provided that the Stifflemires would sell the Property and Bullard would purchase the Property.
3. Both parties agreed to be bound by the Contract for Deed.
4. The purchase price of the Property under the Contract for Deed was \$100,000.
5. The Contract for Deed terms provided that Bullard would make payments in monthly installments of \$643.72, on the first of each month until May 1, 1995, when the entire amount due would be payable as follows:
 - A. \$20,000 would be paid by Bullard on May 1, 1995; and
 - B. the remaining balance due under the Contract for Deed would be evidenced by a Real Estate Lien Note ("Note") accruing interest at the rate of 9% per annum,

payable in monthly installment payments in the amount of \$643.72 for five years, at which time the entire amount of principal and interest remaining unpaid would be due and payable.

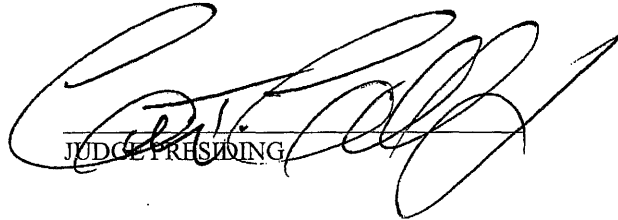
6. As to interest due, the Contract for Deed provided that:
 - A. interest would be calculated on the unpaid deferred principal amount to the date of each payment made, with payments being credited first to accrued interest and then to reduction of principal.
 - B. interest would accrue at 9% per annum on the principal balance of \$80,000 remaining after payment of the \$20,000 due on May 1, 1995; and
 - C. the annual interest rate on matured, unpaid amounts due under the Note was 18%.
7. The Contract for Deed required that:
 - A. Bullard pay when due all taxes and assessments on the Property;
 - B. Bullard reimburse on demand all of the Stifflemires' costs of collection and enforcement, including reasonable attorney's fees, plus interest on those sums from the dates of payment, at the annual interest rate on matured, unpaid amounts; and
 - C. Reasonable attorney's fees would be 10% of all matured and unpaid amounts due under the Contract for Deed.
8. Bullard did not make the \$20,000 payment as required on May 1, 1995.
9. When Bullard failed to make the \$20,000 payment required under the Contract for Deed terms, the Stifflemires agreed to allow Bullard to remain in possession of the Property on a month-to-month lease, with rent to be paid in the amount of \$643.72 per month.
10. Stifflemires never provided any notice of cancellation, acceleration, modification, or forfeiture of the Contract for Deed to Bullard.
11. Bullard has been in possession of the Property since the execution of the Contract for Deed.
12. Bullard has continued to pay the Stifflemires monthly payments of \$643.72 from June 1, 1994 through the time of trial.
13. Bullard has provided both homeowner's and liability insurance for the Property, but has not paid any taxes due on the Property since she has been in possession of it.

14. Bullard had deposited the amount of \$2,500 with Caperton & Towslee Title Company ("Title Company") in January, 1994, in connection with her intended purchase of the Property under an earnest money contract, which eventually was rescinded by Bullard.
15. The Contract for Deed provided that Bullard's \$2,500 earnest money on deposit with Title Company would be applied to the purchase price upon delivery of the deed.
16. Bullard's \$2,500 earnest money deposit was paid by Title Company to Stifflemires on or about February 27, 1997.

CONCLUSIONS OF LAW

1. The Contract for Deed lapsed on May 1, 1995, because Bullard failed to make the \$20,000 payment required under the terms of the contract.
2. As of May 1, 1995, Bullard's possession of the Property was subject to a month-to-month lease.
3. Bullard is entitled to take nothing on her alternate claims in this suit.
4. The Stifflemires are entitled to take nothing on their claims against Bullard for sanctions.

Signed on March 8th, 2017.


JUDGE PRESIDING

APPROVED AS TO FORM:

MOORMAN TATE HALEY UPCHURCH & YATES, LLP

By: Laura Upchurch
Laura Upchurch
State Bar No. 00785131
upchurch@moormantate.com

Attorneys for Defendants

FILED 10:15 Am
DATE 3-8-17
Dana Fritsche
District Clerk, Burlison County
By: Naquell Pena

Tab 3

Contract for Deed

CONTRACT FOR DEED

Date: April 29, 1994, but effective as of May 1, 1994

Seller: REENOCIA ANN STIFFLEMIRE and husband, LARRY STIFFLEMIRE

Seller's Mailing Address (including county):

Rt. 5, Box 263-B,
Caldwell, Texas 77836
(Burleson County)

Buyer: SANDRA K. KOHLBERG

Buyer's Mailing Address (including county):

P. O. Box 653
Taylor, Texas 76574
(Williamson County)

Property: SEE EXHIBIT "A" ATTACHED

Reservations from and Exceptions to Conveyance and Warranty:

SAVE AND EXCEPT, and there is hereby reserved unto Seller, their heirs and assigns, one-half (1/2) of Seller's interest in and to all of the oil, gas and other minerals in and under and that may be produced from the above property, together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals and removing the same therefrom.

This conveyance is made and accepted subject to any and all reservations, restrictions, covenants, conditions, easements and mineral reservations or leases, if any, relating to the hereinabove described property, but only to the extent they are still in effect and shown or record in the public records of Burleson County, Texas; and to all zoning laws, regulations and ordinances of municipal and/or other governmental authorities, if any, but only to the extent that they are still in effect, relating to the hereinabove described property.

Sale Price: ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00)

Down Payment: NONE

Deferred Principal Amount: ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00)

Annual Interest Rate on Deferred Principal Amount from Date:

Nine percent (9%) per annum as to \$80,000.00
Zero percent (0%) per annum as to \$20,000.00

Annual Interest Rate on Matured, Unpaid Amounts:

Eighteen percent (18%)

STIFFLEMIRE 0029



Monthly Payments: SIX HUNDRED FORTY-THREE AND 72/100 DOLLARS
(\$643.72)

Place for Payment (including county):

Rt. 5, Box 263-B
Caldwell, Texas 77836
(Burleson County)

Date of Monthly Payments: 1st day of each month

Date of First Monthly Payment: June 1, 1994

Other Terms of Payment:

Principal and interest are payable in monthly installments of SIX HUNDRED FORTY-THREE AND 72/100 DOLLARS (\$643.72) or more each, on or before the 1st day of every month, beginning June 1, 1994, and continuing regularly until May 1, 1995, when the entire amount then due and owing shall be due and payable as follows:

TWENTY THOUSAND AND NO/100 DOLLARS (\$20,000.00) cash with the remaining balance to be evidenced by a Real Estate Lien Note at Nine percent (9%) interest per annum payable in monthly installments of SIX HUNDRED FORTY-THREE AND 72/100 DOLLARS or more each for a period of 5 years, at which time the entire amount principal and interest remaining unpaid shall be due and payable.

Seller agrees to sell the property to Buyer; Buyer agrees to buy it; and both parties agree to be bound by this contract.

Buyer agrees to pay Seller the sale price for the property.

Buyer will pay Seller the deferred principal amount in the manner specified under "other terms of payment."

Interest will be calculated on the unpaid deferred principal amount to the date of each payment made. Payments will be credited first to the accrued interest and then to reduction of principal.

If Buyer is not in default Seller will convey the property to Buyer by Warranty Deed with Vendor's Lien subject to the reservations from and exceptions to conveyance and warranty, together with a Deed of Trust securing all amounts remaining unpaid under the terms of this Contract.

When Seller conveys the property to Buyer by Warranty Deed, Seller will also furnish an owner's policy of title insurance in the amount of the sale price, subject only to the reservations from

and exceptions to conveyance and warranty, the permitted printed exceptions, and any other matter created, permitted, or suffered by Buyer. All closing costs shall be shared equally by Seller and Buyer.

Buyer has deposited the sum of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$2,500.00) with Caperton & Towslee Title Company, Escrow Agent which sum is to be applied against the purchase price upon delivery of the deed.

Buyer's Obligations

1. Buyer will pay when due all taxes and assessments on the property.

2. Buyer will maintain, in a form acceptable to Seller, an insurance policy that:

- a. covers all improvements for their full insurable value as determined when the policy is issued and renewed, unless Seller approves a smaller amount in writing;
- b. contains an 80 percent coinsurance clause;
- c. provides fire and extended coverage, including windstorm coverage;
- d. names Seller as owner and insured and has a contract of sale endorsement in favor of Buyer; and
- e. contains such other coverage as Seller may reasonably require.

Buyer will deliver the policy to Seller and will deliver renewals of it at least ten days before it expires.

3. Buyer will comply at all times with the requirements of the 80 percent coinsurance clause.

4. Buyer will keep the property in good repair and condition and will keep any buildings occupied as required by the insurance policy.

5. Buyer will permit Seller and Seller's agents to enter the property at reasonable times to inspect it for compliance with Buyer's obligations.

6. If Buyer defaults in the performance of any obligation, Buyer will reimburse Seller on demand at the place for payment for all of Seller's costs of collection and enforcement, including reasonable attorney's fee, plus interest on those sums from the dates of payment at the annual interest rate on matured, unpaid amounts. The sum to be reimbursed shall be added to and become a part of the deferred principal amount. Reasonable attorney's fees shall be 10 percent of all matured and unpaid amounts due under this contract unless either party pleads otherwise.

Seller's Rights

1. Seller may apply any proceeds from the insurance policy either to reduce the deferred principal amount or to repair or replace damaged or destroyed improvements covered by the policy.

2. If Buyer defaults in prompt payment of the monthly payments or violates any other of Buyer's obligations, Seller may invoke the following remedies, subject only to provisions of the Texas Property Code:

- a. declare the entire unpaid deferred principal amount and earned interest immediately due and enforce their collection; or
- b. cancel this contract, declare all of Buyer's interest under this contract forfeited, and retain as liquidated damages all money paid by Buyer to Seller under this contract, in which case the money is considered liquidated damages rather than a penalty, due to the inconvenience and difficulty of determining Seller's actual damages; and
- c. collect rents if the property is rented or rent it and collect rents if it is vacant, and apply the proceeds, less reasonable expenses, to payment of the deferred principal amount.

If the property is not used and not to be used as Buyer's residence, Seller may invoke any or all of these remedies after

Buyer's default continues for ten days. If the property is used or to be used as Buyer's residence, the grace period for default is determined by Section 5.061 of the Texas Property Code or its successor and by any other controlling law. Section 5.061 requires a notice of Seller's intent to forfeit and accelerate, which must be given as specified in Section 5.062 of the Code. Furthermore, the statute requires different waiting times between giving notice and proceeding to forfeit and accelerate:

- a. if Buyer has paid less than 10 percent of the sale price, fifteen days after the date notice is given;
- b. if Buyer has paid 10 percent or more but less than 20 percent of the sale price, thirty days after the date notice is given; and
- c. if Buyer has paid 20 percent or more of the sale price, sixty days after the date notice is given.

Moreover, during any of these applicable periods Buyer may cure default by complying with the terms of this contract up to the date of compliance.

General Provisions

1. As long as Buyer promptly performs all obligations in this contract, Buyer has the right to possession of the property. If this contract is canceled because of Buyer's default, Buyer will immediately surrender possession of the property to Seller. If Buyer fails to do so, Buyer will become a tenant at sufferance of Seller, subject to an action for forcible detainer.

2. Neither this contract nor any part of or interest in the property may be assigned, sold, conveyed, transferred, pledged, or mortgaged by Buyer without the written consent of Seller.

3. If the property is not used and not to be used as Buyer's residence, any notice under this contract must be written and must be personally delivered or sent by registered or certified mail to Seller's or Buyer's mailing address, which may be changed by notice to the other party; notice under this contract will be considered

given on the date of personal delivery or mailing. If the property is used or to be used as Buyer's residence, all notices from Seller to Buyer must be written, must be conspicuous, must be printed in ten-point boldfaced type or upper-case typewritten letters, and must include the statement required by Section 5.062 of the Texas Property Code. If mailed, the notice must be registered or certified, and it will be considered given on the date it is mailed to Buyer's residence or place of business. If not mailed, the notice is considered given when it is delivered to Buyer at Buyer's residence or place of business.

4. Interest on the debt evidenced by this contract shall not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law; any interest in excess of that maximum amount shall be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess shall be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides other provisions in this and all other instruments concerning the debt.

5. Buyer will not file this contract for record.

6. Buyer understands and acknowledges that Buyer does not acquire legal title by this contract and that Buyer will not acquire legal title until Seller's deed is delivered.

7. Seller may transfer legal title to the property without Buyer's consent. If Seller transfers legal title, Seller will require the transferee to assume Seller's obligations in this contract and the transfer and assumption of obligations by the transferee will release Seller from all obligations to Buyer.

8. Buyer has examined the property to Buyer's complete satisfaction and knows its condition. In purchasing the property, Buyer relies only on Buyer's examination and judgment, not on the

representation of any other person as to value, future value, condition, size, age, use, or any other matter. Buyer acknowledges that in selling the property Seller makes no warranties other than title. This contract is the entire and only agreement between Buyer and Seller, and it incorporates all other written, verbal, express, and implied agreements made between any party or any agent of any party to this contract in connection with this transaction. If any provisions in this contract conflict with any provisions in any other instrument, those in this contract shall control.

9. No delay by Seller in enforcing any part of this contract shall be deemed a waiver of any of Seller's rights or remedies. If Seller accepts any payment after its due date, the acceptance shall not be construed as a waiver of any other due date, shall not change any other due date, and shall not waive any of Seller's rights or remedies.

10. This agreement shall bind, inure to the benefit of, and be exercised by successors in interest of all parties, but this provision is subject to paragraph 2 and paragraph 7 of these General Provisions.

11. When the context requires, singular nouns and pronouns include the plural.

SELLER:

REBECCA ANN STIFFLEMIRE

LARRY STIFFLEMIRE

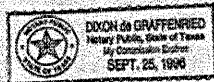
BUYER:

SANDRA K. KOHLENBERG

STIFFLEMIRE 0035

THE STATE OF TEXAS)
COUNTY OF BURLESON)

This instrument was acknowledged before me on the 29th day
of April, 1994, by REBECCA ANN STIFFLEMIRE and husband,
LARRY STIFFLEMIRE.



Dixon de Graffenried
Notary Public, State of Texas

THE STATE OF TEXAS)
COUNTY OF BURLESON)

This instrument was acknowledged before me on the 29th
day of April, 1994, by SANDRA K. KOHLENBERG.



Dixon de Graffenried
Notary Public, State of Texas

STIFFLEMIRE 0036

Being a tract or parcel of land located in Burleson County, Texas, being out of the J.M. Sanchez League, A-55, and being part of the 100 acres conveyed to Mrs. Elizabeth L. Litzenberg Keisler by Mrs. Louise (Frieda) Speckman in a deed dated August 9, 1969 and recorded in Volume 179, Page 283, Deed Records of Burleson County, Texas and being part of the same property described in deed dated November 13, 1978 from Elizabeth L. Litzenberg Keisler and husband Thomas E. Keisler to Clint J. Luksa, recorded in Volume 250, Pages 764-767, Deed Records of Burleson County, Texas and being more particularly described as follows:

BEGINNING at the most S corner of said Keisler in the NE line of State Highway 36, a NW corner of the residue of Mrs. Louise (Frieda) Speckman, a found iron rod set at corner post;

THENCE with the SE line of Keisler, the NW line of Speckman and existing fence, N 56°29'54" E. 1287.32 feet to corner in said fence line, set iron rod for marker;

THENCE severing Keisler 100 acres, N 56°45'36" W. 1105.05 feet to an ell corner of Keisler, the most SE corner of Joe Piwonka 178.55 acres, set iron rod for marker;

THENCE with the S line of Piwonka, a N line of Keisler S 78°22'05" W. at 64 feet fence line and continuing with existing fence, a total distance of 1046.836 feet to a NW corner of Keisler, a SW corner of Piwonka in the NE line of State Highway 36, set iron rod for marker at fence corner post;

THENCE with said highway line and existing R-O-W fence, S 38°20'25" E 1405.61 feet to the place of beginning, containing 30.021 acres of land, more or less.

EXHIBIT "A"

STIFFLEMIRE 0037

Tab 4

1993 TEX. PROP. CODE §5.061

1993 Tex. Prop. Code § 5.061

1993 Texas Code Archive

**TEXAS STATUTES AND CODES > PROPERTY CODE > TITLE 2. CONVEYANCES > CHAPTER
5. CONVEYANCES > SUBCHAPTER D. EXECUTORY CONTRACT FOR CONVEYANCE**

§ 5.061. Avoidance of Forfeiture and Acceleration

A seller may enforce a forfeiture of interest and the acceleration of the indebtedness of a purchaser in default under an executory contract for conveyance of real property used or to be used as the purchaser's residence only after notifying the purchaser of the seller's intent to enforce the forfeiture and acceleration and the expiration of the following periods:

- (1) if the purchaser has paid less than 10 percent of the purchase price, 15 days after the date notice is given;
- (2) if the purchaser has paid 10 percent or more but less than 20 percent of the purchase price, 30 days after the date notice is given;
and
- (3) if the purchaser has paid 20 percent or more of the purchase price, 60 days after the date notice is given.

TEXAS STATUTES AND CODES

End of Document

Tab 5

1993 TEX. PROP. CODE §5.062

1993 Tex. Prop. Code § 5.062

1993 Texas Code Archive

TEXAS STATUTES AND CODES > PROPERTY CODE > TITLE 2. CONVEYANCES > CHAPTER 5. CONVEYANCES > SUBCHAPTER D. EXECUTORY CONTRACT FOR CONVEYANCE

§ 5.062. Notice

- (a) Notice under Section 5.061 of this code must be in writing. If the notice is mailed, it must be by registered or certified mail. The notice must be conspicuous and printed in 10-point boldfaced type or uppercase typewritten letters, and must include the statement:

NOTICE

YOU ARE LATE IN MAKING YOUR PAYMENT UNDER THE CONTRACT TO BUY YOUR HOME. UNLESS YOU MAKE THE PAYMENT BY (date) THE SELLER HAS THE RIGHT TO TAKE POSSESSION OF YOUR HOME AND TO KEEP ALL PAYMENTS YOU HAVE MADE TO DATE.

- (b) The notice must also specify:
- (1) the delinquent amount, itemized into principal and interest;
 - (2) any additional charges claimed, such as late charges or attorney's fees; and
 - (3) the period to which the delinquency and additional charges relate.
- (c) Notice by mail is given when it is mailed to the purchaser's residence or place of business. Notice by other writing is given when it is delivered to the purchaser at the purchaser's residence or place of business. The affidavit of a person knowledgeable of the facts to the effect that notice was given is prima facie evidence of notice in an action involving a subsequent bona fide purchaser for value if the purchaser is not in possession of the real property and if the stated time to avoid the forfeiture has expired. A bona fide subsequent purchaser for value who relies upon the affidavit under this subsection shall take title free and clear of the contract.

TEXAS STATUTES AND CODES

End of Document

Tab 6

1993 TEX. PROP. CODE §5.063

1993 Tex. Prop. Code § 5.063

1993 Texas Code Archive

**TEXAS STATUTES AND CODES > PROPERTY CODE > TITLE 2. CONVEYANCES > CHAPTER
5. CONVEYANCES > SUBCHAPTER D. EXECUTORY CONTRACT FOR CONVEYANCE**

§ 5.063. Right to Cure Default

Notwithstanding an agreement to the contrary, a purchaser in default under an executory contract for the conveyance of real property used or to be used as the purchaser's residence may, at any time before expiration of the applicable period provided by Section 5.061 of this code, avoid forfeiture of interest and acceleration of indebtedness by complying with the terms of the contract up to the date of compliance.

TEXAS STATUTES AND CODES

End of Document